STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2003
v	No. 235606 Montcalm Circuit Court
ERIC MCMURTRY, Defendant-Appellant.	LC No. 00-000268-FC

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and conspiracy to commit first-degree murder, MCL 750.157a. The trial court sentenced him as a fourth habitual offender[1] to mandatory life imprisonment for the first-degree murder conviction and 50 to 80 years' imprisonment for the conspiracy to commit first-degree murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court violated his Sixth Amendment right to confrontation by admitting into evidence Weldon Mosby's taped statement to the police. US Const, Am VI. We review a trial court's decision to admit evidence for an abuse of discretion, *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999); however to the extent that defendant's argument implicates his constitutional right to confrontation, our review is de novo, *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000).

Contrary to defendant's argument, Mosby's entire taped statement was not admitted at trial. Rather, Detective Lieutenant Joe Patino, one of the officers who took Mosby's statement, related portions of Mosby's statement during his testimony at trial. The trial court admitted the statements under MRE 804(b)(3), as a statement made against the declarant's own penal interest. Whether a statement is admissible under MRE 804(b)(3) depends on: (1) whether the declarant was unavailable, (2) whether the statement was against penal interest, and (3) whether a reasonable person in declarant's position would have believed the statement to be true. *People v*

[1] The original judgment of sentence, dated July 13, 2001, stated that defendant was a fourth habitual offender. However, someone wrote a number "3" over the typed number "4" to indicate that defendant was a third habitual offender. The amended judgment of sentence, dated September 5, 2001, states that defendant was a fourth habitual offender.

Schutte, 240 Mich App 713, 715-716; 613 NW2d 370 (2000), quoting *People v Barrero*, 451 Mich 261, 268; 547 NW2d 280 (1996). In a case where portions of the statement inculpate another, but are not directly against the declarant's interest, the statements are admissible as substantive evidence if the declarant's inculpation of an accomplice is made in the context of narrative events, the statement is made at the declarant's initiative without prompting or inquiry, and if the statement as a whole is clearly against the declarant's penal interest and as such is reliable. *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993).

In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against another person without violating the defendant's constitutional right to confrontation, courts must evaluate the circumstances surrounding the making of the statement as well as the content. *Id*. at 165. The presence of the following factors would favor admission of the statement: "whether the statement was (1) voluntarily given, (2) made contemporaneously with the events reference, (3) made to family, friends or colleagues, . . . that is to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener." *Id*. Whereas, the presence of the following factors would favor a finding of inadmissibility: "whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth." *Id*.

Patino's testimony regarding Mosby's statement was inadmissible under MRE 804(b)(3) and its admission of the statement violated defendant's right to confrontation. Although Mosby's statement was made in the context of narrative events, was voluntary, and, as a whole was against his penal interests, it cannot be said the statement was made without any prompting or inquiry. The statement was made thirteen days after the victim was killed and was not uttered spontaneously to family or friends, but was made to law enforcement officers. The law enforcement officers questioned, inquired, and prompted Mosby throughout the entire statement, and the statement could have been made to curry favor with law enforcement so Mosby could get some kind of deal. Moreover, Mosby, defendant, and a third accomplice all attempted to shift the blame to reduce their own culpability; therefore, Mosby's statement was not reliable. *Poole*, *supra* at 165. Consequently, the totality of the circumstances did not indicate that the statements were sufficiently reliable to allow their admission into evidence, and the admission of the statements deprived defendant of his constitutional right to confrontation.

However, although the trial court abused its discretion in admitting the evidence under MRE 804(b)(3) and deprived defendant of his constitutional right to confront Mosby, we find the error was harmless. An error in the admission of evidence is not a ground for setting aside a verdict or disturbing a judgment unless refusal to do so would be inconsistent with substantial justice or would result in a miscarriage of justice. MCL 769.26; MCR 2.613(A). In addition, a constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). In light of the totality of the evidence presented at trial, the erroneous admission of Lieutenant Patino's testimony regarding Mosby's statement was not inconsistent with substantial justice and did not result in a miscarriage of justice. There was testimony from

defendant himself and from Jerome Gass that established defendant's guilt independent of Patino's testimony of Mosby's statement. Because a rational jury would have found defendant guilty without the improperly admitted evidence, the constitutional error was harmless.

Defendant next argues that substitute defense counsel was ineffective during the hearing on the motion to suppress Mosby's statements because he was unprepared and because he relied on the brief that had been filed in support of the motion instead of vigorously arguing the motion. It was not objectively unreasonable for defense counsel not to orally argue the same arguments that had been written and presented very well in the brief. While defendant may have been unhappy with defense counsel's decision not to orally argue every point outlined in the brief, the defendant's evaluation of counsel's performance is irrelevant. Moreover, when claiming ineffective assistance due to counsel's unpreparedness, a defendant must show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Although the trial court did err in admitting Mosby's statement through Lieutenant Patino's testimony, defendant has not shown that the trial court's error resulted from any omission on the part of defense counsel at the suppression hearing. Consequently, defendant has failed to overcome the presumption that defense counsel was effective. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999).

Defendant next argues that he was denied a fair trial by an impartial jury because defense counsel failed to move for a change of venue. When the jury was empanelled, defense counsel asserted "we are pleased with the jury your Honor." Because defense counsel specifically affirmatively "expressly approved" and "clearly expressed satisfaction" with the jury, defendant has waived this issue on appeal. *People v Carter*, 462 Mich 206, 216, 219; 612 NW2d 144 (2000). However, to the extent defendant claims trial counsel was ineffective for failing to request a change of venue, we will address the issue.

According to defendant, a change of venue was necessary because he was tried after a coconspirator was tried in the same county and more than twenty newspaper articles about the case appeared in the local newspaper. Ordinarily, a defendant "must be tried in the county where the crime is committed"; however, "in special circumstances where justice demands or statute provides," the trial court may order a change of venue. *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997).[2] To determine if a defendant's trial was fundamentally unfair, the

[2] Although defendant did not request a change of venue, we note that there are two approaches for determining whether a trial court abused its discretion in denying a motion for change of venue because of concern regarding the defendant's ability to receive a fair trial:

> Community prejudice amounting to an actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. [*People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997).]

court must look at the totality of the circumstances, including whether media coverage remained "largely factual" or became "invidious or inflammatory." *Id*. at 502, 504, quoting *Murphy v Florida*, 421 US 794, 799-800; 95 S Ct 2031; 44 L Ed 2d 589 (1975). In addition to examining the pretrial publicity, the entire voir dire must also be examined to determine if an impartial jury was empanelled. *Jendrzejewski*, *supra* at 517.

After reviewing the newspaper articles concerning the case, we conclude that they accurately and objectively related the events surrounding the victim's death and the subsequent investigation and trials. Furthermore, after reviewing the transcript in which the jury was selected, it is apparent that the pretrial publicity did not "saturate[]" the community so much that the "entire jury pool was tainted[.]" *Jendrzejewski*, *supra* at 500-501. In addition, in light of the fact that only six members of the jury venire affirmatively indicated that they were prejudiced, defendant has not demonstrated a "community bias" based on "a high percentage of the venire who admit to a disqualifying prejudice." *Id.* at 501. Further, those six were excused by the court.

Defendant also argues that he was denied the right to a jury drawn from a fair cross section of the community. Defendant presented no evidence on the jury venires in Montcalm County in general, and one case of alleged underrepresentation is not sufficient to show that the representation of African Americans in jury venires in Montcalm County is not fair and reasonable in relation to the number of African Americans in the community. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). In addition, defendant does not even argue that any alleged underrepresentation was due to systematic exclusion of African Americans in the jury selection process in Montcalm County, and systematic exclusion "cannot be shown by one or two incidents of a particular venire being disproportionate." *Id.*, quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Consequently, we reject defendant's contention that he was denied the right to a jury drawn from a fair cross section of the community because defendant has failed to establish a prima facie violation of the fair-cross-section requirement of US Const, Am VI. *Williams*, *supra* at 525-526.

Defense counsel was not ineffective in failing to move for a change of venue. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, as indicated above, a motion for change of venue would not have been successful. Defense counsel is not required to make motions that have no merit. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Therefore, defendant has failed to show how he was prejudiced by defense counsel's alleged error in failing to move for a change of venue. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant finally argues that the prosecutor deprived him of a fair trial by improperly bolstering Carla Ringleka's testimony by asking her if her story changed after she entered into the plea agreement with the prosecutor. Evidence of a prior consistent statement of a witness is generally inadmissible as substantive evidence. *People v Washington*, 100 Mich App 628, 632; 300 NW2d 347 (1980). However, a prior statement of a witness is admissible to rebut a charge of improper motive. MRE 801(d)(1)(B). To be admissible under MRE 801(d)(1)(B), four elements must be established: (1) the declarant must testify at trial and be subject to cross-examination, (2) there must be an express or implied charge of recent fabrication or improper influence or motive or the declarant's testimony, (3) the prior consistent statement must be

consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement must be made before the time that the alleged motive to falsify arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

In this case, evidence that Ringleka's story did not change after she was offered her plea agreement was properly admissible under MRE 801(d)(1)(B). *Jones*, *supra*. Defense counsel opened the door for the evidence by suggesting during opening argument that Ringleka was motivated to lie in order to get a plea agreement from the prosecutor. Prosecutorial misconduct cannot be premised on a good-faith effort to admit evidence. *Noble, supra* at 660. To the extent that the prosecutor's attempt to elicit evidence of Ringleka's prior consistent statement was admissible under MRE 801(d)(1)(B) and was in response to defense counsel's statements during opening argument, the prosecutor's conduct was not improper.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot